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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

RONALD ALLEN HARMELIN,

Petitioner,

-vs-

STATE OF MICHIGAN,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MICHIGAN

BRIEF OF AMICUS CURIAE STATE OF ARIZONA IN SUPPORT OF THE RESPONDENT, STATE OF MICHIGAN

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Question Presented

Should this Court revisit Solem v. Helm, because it has opened the floodgates to appellate review of sentences solely of imprisonment and has resulted in conflicting applications of its doctrine?

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INTEREST OF AMICUS CURIAE

Amicus curiae asks this Court to review its decision in Solem v. Helm, 463 U.S. 277 (1983), because that decision has resulted in flagrant overreaching by state and federal courts in redefining crimes and reestablishing punishments therefor; it has allowed courts to act as superlegislatures; and it has wreaked havoc upon law enforcement efforts, which must thereafter be second-guessed by courts on the charge of cruel and unusual punishment. The decision has created conflicts among the various courts of the United States, because the purportedly objective criteria set forth in that decision actually are subjective and result in abrogating legislative intent when sentences solely of imprisonment are reviewed on Eighth Amendment grounds. The Arizona Supreme Court has recently misapplied Solem v. Helm by overturning a sentence of 40 years' imprisonment for two counts of sexual conduct with a minor,

finding that sentence to be unconstitutionally cruel and unusual. State v. Bartlett, ___ Ariz. ___, 792 P.2d 692 (1990). Amicus curiae has asked this Court to review that decision in a petition for certiorari filed September 13, 1990.

SUMMARY OF ARGUMENT

Michigan's statute required that the sentencer sentence petitioner to a mandatory life sentence without the possibility of parole for possessing in excess of 650 grams of cocaine. This Court has held that, in reviewing the constitutionality of a sentence, objective criteria must be considered; however, this "objective criteria" is not objective, and their use results in conflicting eighth amendment analyses. Mandated consistency of sentences for like crimes destroys all notions of federalism inherent in the United States Constitution, and permits courts to redetermine sentences determined appropriate by the constituents of the states enacting legislation.

Amicus submits that this Court should overrule Solem v. Helm and allow states to determine what acts should be criminal and what punishments are appropriate for the commission of those acts, without resorting to a national standard, and without imposing techniques of comparison that destroy all notions of federalism. Except in those rare instances contemplated by the eighth amendment, courts should not undertake proportionality review of sentences solely of imprisonment.

ARGUMENT

IN MAKING A BREAK FROM TRADITIONAL EIGHTH AMENDMENT[1] ANALYSIS BY EXAMINING SENTENCES OF IMPRISONMENT, AS WELL AS THE MANNER IN WHICH SENTENCES ARE CARRIED OUT, SOLEM v. HELM SET FORTH AN UNWORKABLE TEST TO DETERMINE WHETHER A GIVEN SENTENCE IS PROPORTIONAL TO A GIVEN CRIME; THIS HOLDING CREATED A JUDICIAL ABERRATION, WHICH THE DISSENT FORESAW WOULD RESULT IN CONSTITUTIONAL CHAOS, A RESULT THAT HAS COME TO PASS.

A. HISTORY DEMONSTRATES THE JUDICIAL EVOLUTION THAT OCCURRED BETWEEN RUMMEL v. ESTELLE AND SOLEM v. HELM.

In Rummel v. Estelle, 445 U.S. 263 (1980), this Court specifically rejected the invitation to extend eighth amendment analysis to challenges solely of sentences of imprisonment, finding:

> Given the unique nature of the punishments considered in Weems [v. United States] and in the death penalty cases, one could argue without fear of contradiction by any decision of this Court that for

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1. The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

> crimes concededly classified andclassifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative.

Rummel, 445 U.S. at 274. This Court found it difficult, if not impossible, to differentiate between one term of years for a specific crime and another term of years, and refused to engage in that "line-drawing" that is peculiarly the province of the legislatures. Id. at 275. Rummel specifically asked the Court to apply "objective" criteria to determine that his sentence was out of sync with the majority of states whose sentencing provisions were markedly different from the recidivist statute under which he was sentenced to life imprisonment. The majority of this Court rejected these objective criteria, saying:

> Absent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State.

Id. at 283.

Three years later, this Court issued its opinion in Solem v. Helm, 463 U.S. 277 (1983), in which it appeared to embrace the objective criteria it had recently rejected in Rummel, without overruling that decision. In Solem, this Court set forth an "objective" test to determine whether a given sentence was proportional to a given crime. Factors that a court should consider include:

> (1) Looking at the gravity of the offense and the harshness of the penalty;
>
> (2) Comparing the sentences imposed on other criminals in the same jurisdiction; and
>
> (3) Comparing the sentences imposed for the same crimes in other jurisdictions.

Id. at 290-91. The Court completely unraveled its prior precedent and opened the doors to proportionality challenges such as the one before this Court.

B. CHIEF JUSTICE BURGER'S PROPHECY HAS BECOME REALITY.

The concerns outlined by the Rummel majority are the same as those concerns

expressed by Chief Justice Burger, writing for the four-member dissent in Solem v. Helm. Chief Justice Burger wrote:

> The controlling law governing this case is crystal clear, but today the Court blithely discards any concept of stare decisis, trespasses gravely on the authority of the states, and distorts the concept of proportionality of punishment by tearing it from its moorings in capital cases.

Solem v. Helm, 463 U.S. at 304. Chief Justice Burger warned that the majority's decision in Solem would allow appellate judges to substitute their own sense of what is proportional and what is not proportional, undermine the authority given to legislatures to define crimes and determine punishments, and subject all sentences of imprisonment to appellate scrutiny. Id. at 305.

Chief Justice Burger, pointing out the futility of comparing disparate crimes and punishments, reiterated:

> It is one thing for a Court to compare those States that impose capital punishment for a specific offense with those States that do not. It is quite another thing for a Court to attempt to evaluate the position of any particular recidivist scheme within Rummel's complex matrix.

Rummel, 445 U.S. at 281. The Chief Justice warned that making comparisons among the various states tramples on the fundamental concepts of federalism, and ignores the implication of various legislatures' recognition of different societal interests. Such comparisons are thus rendered speculative at best.

Chief Justice Burger attempted to set forth some hypothetical examples of what the future would bring:

> Suppose one offense was a simple assault? Or selling liquor to a minor? Or statutory rape? Or price fixing? The permutations are endless and the Court's opinion is bankrupt of realistic guiding principles. Instead, it casually lists several allegedly "objective" factors and arbitrarily asserts that they show respondent's sentence to be "significantly disproportionate" to his crimes.

Solem v. Helm, 463 U.S. at 314-15.

Just as Chief Justice Burger warned, the majority's opinion in Solem v. Helm provided no guidelines for implementation of the tests set forth therein. There is no meaningful way to measure the weight to be given to certain offenses, or the legislative intent behind the enactment of certain penalties. The Chief Justice feared that the majority's decision would flood appellate courts with cases challenging sentences on eighth amendment grounds and "administer the coup de grace to the courts of appeals as we know them." Solem v. Helm, 463 U.S. at 316. As the statistics reported below demonstrate, the Chief Justice's fears have indeed become a reality, as the appellate courts have been flooded with challenges to the proportionality of sentences, following the Solem v. Helm decision.[2]

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2. As of September 5, 1990, there were 772 reported decisions citing Solem v. Helm. Of those cases reviewed, it is

However, actual comparisons among states are impossible, given the varieties of sentences available for a variety of different criminals. Numerous factors play upon what any given defendant may receive as a sentence for a similar crime. These variables and permutations complicate and obscure any meaningful analysis, and demonstrate the

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(Footnote 2 continued)

apparent that various state and federal courts interpret the mandate of Solem differently. Some interpret the case to require review only of sentences of life imprisonment without the possibility of parole [Maddox v. State, 502 So. 2d 790 (Ala. 1986); McLester v. State, 460 So. 2d 870, 873-75 n.2 (Ala. Crim. App. 1984); Webb v. State, 539 So. 2d 343 (Ala. Crim. App. 1987); Donahoo v. State, 505 So. 2d 1067 (Ala. Crim. App. 1986). See United States v. Rhodes, 779 F.2d 1019, 1027-28 (4th Cir. 1985), cert. denied, 476 U.S. 1182 (1986)]; while others seem to put each sentence before it through the rigors of a Solem analysis. A comparison of the different interpretations of the eighth amendment spawned by Solem is discussed infra at 11-14.

lack of objectivity inherent in the tests outlined by the Solem Court.

C. COURTS HAVE PLACED DIFFERENT INTERPRETATIONS UPON THE DOCTRINE SET FORTH IN SOLEM v. HELM, THEREBY MAKING COMPARISONS REQUIRED THEREUNDER IMPOSSIBLE.

As mentioned earlier, there is a vast uncertainty among state and federal courts about the meaning of the tests set forth in Solem v. Helm, and the cases to which they apply. In Marrero v. Wainwright, 823 F.2d 1468, 1470 (11th Cir. 1987), the Eleventh Circuit Court of Appeals rejected the argument propounded by the government that only those cases involving ineligibility for parole were subject to review under Solem.

In contrast to the Marrero decision, the Alabama courts and the Fourth Circuit Court of Appeals have held that the Solem v. Helm analysis is to be applied only in cases involving sentences of life without the possibility of parole. See footnote 2, supra.

In the case before this Court, the Michigan Court of Appeals found it unnecessary even to address the applicability of Solem v. Helm, or to put the facts of this case through the rigors of Solem's analysis.

In Maryland, when applying the second prong of the Solem v. Helm test, the court compares defendants who have committed crimes within the same category of offenses. See State v. Davis, 310 Md. 611, 530 A.2d 1223 (Md. 1987). The Maryland court looks at particular categories of crimes, and the punishments set forth therefor. If all defendants who commit a particular class of crime are sentenced similarly, the inquiry ends under this prong of the Solem test. The Ninth Circuit Court of Appeals has interpreted Solem and upheld sentences challenged under the second prong, because all offenders who committed crimes while released from confinement

were treated alike. Cocio v. Bramlett, 872 F.2d 889 (9th Cir. 1989). By contrast, the Arizona Supreme Court held that a court must look at punishments for any and all crimes that can be committed within a jurisdiction to meet the Solem test. State v. Bartlett, 792 P.2d 692, at 699 (Ariz. 1990).

Under the third prong of Solem, both Maryland and the fourth circuit subscribe to the interpretation that Solem requires a comparison of what sentences could be imposed in other jurisdictions, not merely what sentences actually have been imposed. State v. Davis; United States v. Rhodes; Teeter v. State, 499 A.2d 503 (Md. App. 1985). By contrast, the Arizona court stated it must look at other sentences actually imposed, to meet the Solem test. Bartlett, 792 P.2d at 700-03.

In Bartlett, the Arizona Supreme Court overturned a sentence of 40 years'

imprisonment for two counts of sexual conduct with a minor, after applying the "objective" criteria of Solem. In analyzing those factors, the court redrew lines set by the legislature in determining the severity of the offense; chose a non-related group of offenders in Arizona to compare sentences of varying severity; and limited its inquiry under the third prong of the test to cover only sentences actually imposed in other jurisdictions for identical crimes, where factors of mandatoriness, parole eligibility, age of victims, repeat offender classifications, and identity of elements all coalesced. State v. Bartlett, 792 P.2d 692. It then formulated a remedy that has resulted in the defendant being sentenced to less than the statutory minimum for the crimes he committed.

Even though this Court has said that successful challenges to the

proportionality of particular sentences are "exceedingly rare," courts are nevertheless succumbing to challenges of sentences solely of imprisonment, without giving the deference required by this Court and the United States Constitution to the legislatures who define crimes and the punishments therefor.

The result is that courts are now allowed to redefine crimes and in essence determine whether the conduct proscribed by one state also may be proscribed by others. Even if a court finds that certain conduct may be proscribed by one state while it is lawful in another, under a Solem v. Helm challenge, the sentence may be found unconstitutional, because there are only a few other states that prohibit the conduct. See, e.g., Bowers v. Hardwick, 478 U.S. 186 (1986) (Georgia's prohibition of consensual sodomy does not violate rights of privacy and sodomy may be made criminal). Thus,

while the conduct may be lawfully prohibited, under a Solem v. Helm analysis, it may not be constitutionally punished, because it may fail under Solem's third prong.

Petitioner misdirects this Court when it asks it to compare death penalty analysis to the analysis in cases such as his. It is instructive, however, to note that, in death penalty cases, this Court has repeatedly held that a proportionality review (such as Solem mandated) is unnecessary. McClesky v. Kemp, 481 U.S. 279 (1987); Pulley v. Harris, 465 U.S. 37 (1984). It seems odd that, in cases where the ultimate punishment is imposed, proportionality review is not required; however, in cases not involving the death penalty, but subject to great variations in punishments for differently defined crimes, such analysis is required.

It is time for this Court to review its decision in Solem, because of the effect that decision is having on law enforcement, and because of the judicial activism that it is fostering. As a result of the opinion, great conflict now exists across the country among courts regarding the appropriate cases to which to apply Solem v. Helm, and in cases in which that doctrine is "applied," inconsistent results are occurring. In its present framework, Solem v. Helm is unworkable, and either should be modified or overruled.

CONCLUSION

Courts are misinterpreting and misapplying the doctrine set forth in Solem v. Helm. They are using that opinion as a vehicle through which to change judicially unpopular laws and mandatory sentences required thereunder. Because the criteria are really subjective, judges have no guidance in

applying them in given situations. Thus, amicus asks that this Court overrule Solem v. Helm, or modify it to afford litigants needed guidance in doing meaningful analyses under the eighth amendment.

Amicus curiae asks this Court to affirm the judgment of the Michigan Court of Appeals.

Respectfully submitted,

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